Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12-47-87
ZAKARIA YATIM J
21 FEBRUARY 1992

Negotiable Instruments *— Traveller's cheque — Legal nature of traveller's cheque*

Negotiable Instruments *— Traveller's cheque — Payment on — Stolen cheques used in payment of goods sold by respondent — Respondent a bona fide holder in due course of cheques — Whether respondent entitled to payment on cheques — Whether appellant issuing bank liable to honour cheques presented by respondent*

On 30 August 1982, one Chaiyos purchased traveller's cheques worth S$32,000 from the appellant bank. He had used five traveller's cheques amounting to S$6,000 and subsequently, the remaining traveller's cheques were stolen from him by persons unknown at the Jakarta Airport. He reported the loss to the appellant and also lodged a police report in Singapore. The appellant refunded Chaiyos the full amount of the traveller's cheques which he lost.

Unknown to the respondent, on 16 September 1983, one Frankie had used 21 of the stolen cheques totalling S$20,500 in value to pay for the watches he bought from the respondent. When the respondent presented the said traveller's cheques to the appellant for payment, the appellant refused payment.

The appellant averred that the respondent had no cause of action against them because (a) the traveller's cheques were neither bills of exchange nor promissory notes, (b) Frankie had no title to the said traveller's cheques, (c) the said traveller's cheques were purportedly counter-signed by Frankie and not the appellant's customer, Chaiyos, and (d) the respondent was not an authorized paying agent of the appellant, and, if it had made enquiries from such an authorized agent, the respondent would have learnt that the traveller's cheques were stolen as the appellant had notified its paying agents throughout Malaysia.

The respondent's case was that it was a holder for value of the said traveller's cheques without notice of any defect and had in the normal course of practice taken the necessary precaution required of it. It was therefore the duty of the appellant to honour such traveller's cheques when presented for payment and that the appellant had wrongfully and in breach of its duty dishonoured the said traveller's cheques.

The sessions court gave judgment for the respondent. The appellant appealed against the sessions court's decision.

Held, dismissing the appeal:

(1) The traveller's cheque is an order to pay subject to the condition that it must be countersigned by the person whose signature

A appears at the top of the cheque. Since a traveller's cheque is a conditional order, it cannot be regarded as a bill of exchange, promissory note or even a cheque as defined in the Bills of Exchange Act 1949.

(2) The respondent's claim on contract against the appellant could not succeed because it was not a party to the contract which was entered into between the appellant and Chaiyos.

(3) The issuing bank (appellant) was under a legal obligation to honour all traveller's cheques, including cheques alleged to have been stolen or forged, when the same were presented for payment by a bona fide holder in due course.

(4) From the evidence, the respondent took the traveller's cheques in good faith and for valuable consideration. The respondent had also complied with the procedure laid down by the appellant for accepting the traveller's cheques. The respondent being a bona fide holder in due course was entitled to payment by the appellant irrespective of whether the traveller's cheques were stolen or whether the person who presented the traveller's cheques did not have a good title.

[Bahasa Malaysia summary

Pada 30 Ogos 1982, seorang bernama Chaiyos telah membeli cek pengembara bernilai S$32,000 daripada bank perayu. Beliau telah menggunakan lima cek pengembara berjumlah S$6,000 dan kemudiannya, baki cek pengembara itu telah dicuri daripadanya oleh orang-orang yang tidak diketahui di Lapangan Terbang Jakarta. Beliau telah melaporkan kehilangan itu kepada perayu dan juga telah membuat satu laporan polis di Singapura. Perayu telah mengembalikan Chaiyos jumlah penuh cek pengembara yang telah hilang itu.

Tanpa diketahui oleh responden, pada 16 September 1983, seorang bernama Frankie telah menggunakan 21 daripada cek curian itu berjumlah S$20,500 nilainya untuk membayar harga jam tangan yang dibeli olehnya daripada responden. Apabila responden mengemukakan cek pengembara tersebut kepada perayu untuk pembayaran, perayu telah enggan membuat pembayaran. Perayu mengatakan bahawa responden tidak ada kausa tindakan terhadap mereka kerana (a) cek pengembara itu bukan bil pertukaran dan bukan nota janji hutang, (b) Frankie tidak mempunyai hakmilik ke atas cek pengembara itu, (c) cek pengembara itu telah dikatakan ditandatangani balas oleh Frankie dan bukan pelanggan perayu, Chaiyos, dan (d) responden bukan ejen pembayar yang dibenarkan oleh perayu, dan, jika ia telah membuat pertanyaan daripada ejen pembayar yang dibenarkan, responden akan dapat mengetahui bahawa cek pengembara itu telah dicuri kerana perayu telah memberitahu ejen pembayarnya di seluruh Malaysia.

Kes responden adalah bahawa ia menjadi pemunya bagi nilai cek pengembara tersebut tanpa notis akan sebarang kecacatan dan telah dalam perjalanan biasa amalannya mengambil tindakan mencegah yang perlu yang dikehendaki dibuatnya. Oleh kerana itu adalah ke-

wajipan perayu untuk menerima cek pengembara seperti itu serta membayar wang apabila cek tersebut dikemukakan untuk pembayaran dan perayu telah dengan cara yang salah dan dengan melanggar kewajipannya enggan melayani cek pengembara itu. Mahkamah sesyen telah memberi penghakiman kepada responden. Perayu membuat rayuan terhadap keputusan mahkamah sesyen itu.

Diputuskan, menolak rayuan itu:

(1) Cek pengembara adalah suatu perintah untuk membayar tertakluk kepada satu syarat bahawa ianya mesti ditandatangani balas oleh orang yang tandatangannya kelihatan di bahagian atas cek itu. Kerana cek pengembara ialah suatu perintah bersyarat, ia tidak boleh dianggap sebagai satu bil pertukaran, nota janji hutang ataupun satu cek seperti yang ditakrifkan di bawah Akta Bil Pertukaran 1949.

(2) Tuntutan responden atas kontrak terhadap perayu tidah boleh berjaya kerana ia bukan pihak kepada kontrak yang telah diikat antara perayu dan Chaiyos.

(3) Bank pengeluar cek (perayu) adalah di bawah suatu obligasi undang-undang untuk menerima dan membayar semua cek pengembara, termasuk cek yang dikatakan telah dicuri atau direkapalsu, apabila cek itu dikemukakan untuk pembayaran oleh seorang pemunya bona fide mengikut perjalanan cek itu (bona fide holder in due course).

(4) Daripada keterangan yang ada, responden telah mengambil cek pengembara itu dengan suci hati dan untuk balasan bernilai. Responden telah juga mematuhi prosedur yang telah ditetapkan oleh perayu bagi menerima cek pengembara itu. Responden sebagai pemunya bona fida mengikut perjalanan cek itu berhak kepada pembayaran oleh perayu tidak kira sama ada cek pengembara itu telah dicuri atau sama ada orang yang mengemukakan cek pengembara itu tidak mempunyai hakmilik yang sah.]

[*Editorial Note*: The defendant/appellant has appealed to the Supreme Court vide Civil Appeal No 02–184–92.]

Cases referred to

1 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (refd)
2 *Braithwaite v Thomas Cook Travellers Cheques* [1989] 1 All ER 235; [1989] QB 553; [1989] 3 WLR 212 (distd)
3 *Fellus v National Westminster Bank* (1983) 133 NLJ 766 (distd)
4 *El Awadi v Bank of Credit and Commerce International SA* [1989] 1 All ER 242; [1990] 1 QB 606; [1989] 3 WLR 220 (distd)
5 *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 (folld)
6 *Director General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214 (folld)
7 *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 (refd)

8 *Re Haji Mohamed Eusoff decd* [1981] 2 MLJ 77 (refd)
9 *High Mark (M) Sdn Bhd v Pacto Malaysia Sdn Bhd* [1987] 2 MLJ 85 (refd)
10 *Howe Yoon Chong v Chief Assessor & Anor* [1990] 1 MLJ 321 (refd)
11 *American Express Co v Anadarko Bank & Trust Co* 67 Pacific Reporters (2d) 55 (folld)
12 *Transcontinental & Western Air Inc v Bank of America National Trust & Savings Association* 116 Pacific Reporters (2nd) 791 (folld)
13 *Emerson v American Express Co* 90 Atlantic Reporters (2nd) 236 DC (folld)
14 *Ashford v Thomas Cook & Son (Bankers) Ltd* 471 Pacific Reporters (2d) 530 (folld)

Legislation referred to
Bills of Exchange Act 1949 ss 3(1), 29(1), 73(1), 88
Contracts Act 1950 s 2(d)
Bills of Exchange Act 1882 [UK] s 29

Appeal from: Summons No 4204 of 1983 (Sessions Court, Kuala Lumpur)

YM Chin (Allen & Gledhill) for the appellant.
Belinda Tan (Gill & Tang) for the respondent.

Cur Adv Vult

Zakaria Yatim J: This is an appeal against the decision of the Sessions Court, Kuala Lumpur given on 21 May 1986. On that day, the learned President gave judgment for the respondent for a sum of S$20,000 together with interest at the rate of 8% pa from 16 September 1983 till the date of full realization.

The respondent is a limited company incorporated in Malaysia and having its registered office at No 8 Jalan Bukit Bintang, Kuala Lumpur and carrying on the business of watch retailers at its registered office as well as at Lot G66–67, Sungei Wang Plaza, Jalan Sultan Ismail, Kuala Lumpur. The appellant is a bank incorporated in the Republic of Singapore whose address for service is at Oversea Chinese Banking Corporation Building, Jalan Melaka, Kuala Lumpur.

The respondent's claim against the appellant, as pleaded in the statement of claim, is as follows: On or about 16 September 1983, one Frankie Seah Yiak Huat ('Frankie') walked into the respondent's shop at Sungei Wang Plaza and purchased watches at the price of S$20,500 from the respondent and in payment thereof the said Frankie gave the respondent 21 Oversea Chinese Banking Corporation Ltd Singapore dollars traveller's cheques numbers YD105993 to 106012 and RC216144 totalling S$20,500 in value. The respondent's manager at the shop accepted the said traveller's

cheques after checking the photograph on Frankie's passport, a Singapore passport No 0239234/4, against the person making the purchases. The manager also ensured that there was no notice in the respondent's records that the said traveller's cheques had been reported lost or stolen. The said Frankie then signed all the said traveller's cheques in the presence of the respondent's employee, one Wong Khim Fatt, who, after having checked the fresh signatures against the existing signatures on the said cheques delivered possession of the goods purchased on the faith that the said traveller's cheques would be duly honoured when presented for payment. The respondent, being holders for value of the said traveller's cheques without notice of any defect and having in the normal course of practice taken the necessary precaution required of them, presented the said traveller's cheques through their bankers for payment. According to the respondent, it was the duty of the appellant to honour any traveller's cheques drawn on the appellant by the purchaser of the said cheques when presented for payment provided that the holders for value of the said cheques held the said cheques without notice of any defect and after having taken the precautions required of them. The respondent alleged that the appellant had wrongfully and in breach of the said duty dishonoured the said traveller's cheques when presented to them for payment on the ground that the said traveller's cheques were reported lost or stolen. The respondent, through their solicitors, sent a notice of dishonour to the appellant by a letter dated 18 October 1983 but no payment was made by the appellant. The plaintiff's claim against the appellant was for the sum of S$20,500 together with interest on the said sum at the rate of 8% pa from 16 September 1985 to the date of settlement.

The appellant in their statement of defence averred that they issued traveller's cheques to customers drawn on the appellant and payable by the appellant's authorized paying agents on the condition that:

(a) the customer appended his signature to the traveller's cheques at the time of purchase; and
(b) the customer appended his signature a second time to the traveller's cheques in the presence of the paying agent.

The appellant averred that their traveller's cheques were neither bills of exchange within the meaning of s 3(1) of the Bills of Exchange Act 1949 ('the Act') nor promissory notes within the meaning of s 88 of the Act. According to the appellant the traveller's cheques referred to in the statement of claim were sold by the appellant to one Chaiyos Tiangtrongpinyo ('Chaiyos'). The traveller's cheques were subsequently stolen from Chaiyos by persons unknown at Jakarta Airport on or about 1 September 1982. The appellant averred that the respondent had no cause of action against them because:

(a) the traveller's cheques were neither bills of exchange nor promissory notes;
(b) the said Frankie had no title to the said traveller's cheques; and
(c) the said traveller's cheques were purportedly counter-signed by the said Frankie and not the appellant's customer, Chaiyos.

A The appellant further averred that the respondent was not an authorized paying agent of the appellant. Had the respondent enquired from an authorized paying agent of the appellant as to whether the said traveller's cheques were stolen, the respondent would have learnt that the traveller's cheques were stolen as the appellant had notified its paying agents throughout Malaysia.

B After hearing all the evidence adduced before him at the trial, the learned President gave judgment for the respondent. In the memorandum of appeal, the appellant relied on a number of grounds, namely:

(1) the learned President erred in law and in fact by failing to consider the C question as to whether the traveller's cheques could be categorized as bills of exchange or promissory notes as the case may be;
(2) the learned President erred in law and in fact by holding that, since the respondent's claim being founded on an alleged duty on the part of the appellant to honour the traveller's cheques:

D (a) the respondent was the acceptor of the traveller's cheques, which was not so in law;
(b) there was an offer made to the world at large;
(c) the fact that the countersignature on the cheques was not the signature of the person who originally purchased the cheques was not a determining factor;

E (3) the learned President misapplied the principle of law as stated in *Carlill v Carbolic Smoke Ball Co*[1] at p 256 to the facts of the present case as there was no consideration moving from the respondent to the appellant;
(4) the learned President erred in law by failing to consider the fact that the F person who dealt with the respondent was not the original purchaser of the traveller's cheques and that the traveller's cheques had been stolen;
(5) the learned President erred in law by holding that traveller's cheques had acquired universal usage in the absence of any evidence being adduced by the respondent as to such usage;
G (6) the learned President erred by holding that the signature at the bottom agreed with the signature at the top and that the two signatures were signed by one and the same person;
(7) the learned President erred by holding that the appellant was liable to pay even when the signature at the bottom was not the same as the signature at the top because it was a condition of the sale of the H traveller's cheques that the person who [signed at the top] was also the person to sign at the bottom of the traveller's cheques.

From the evidence adduced at the trial, Chaiyos purchased traveller's cheques worth S$32,000 from the appellant on 30 August 1982. Out of these traveller's cheques he had used five traveller's cheques amounting to I S$6,000 which were duly honoured by the appellant. Subsequently, the remaining traveller's cheques were stolen at the Jakarta Airport. He reported the loss to the appellant. He also lodged a police report in Singapore. The appellant refunded Chaiyos the full amount of the traveller's cheques

which he lost. Unknown to the respondent, Frankie had used the stolen cheques to pay for the watches he bought from the respondent. When the respondent presented the said traveller's cheques to the appellant for payment, the appellant refused payment.

In considering the appeal, it is necessary to ascertain what is the legal nature of the traveller's cheques in the context of the present case. In order to determine this question, it is necessary to examine the traveller's cheque in question. At the top of the traveller's cheque are the words 'Singapore Dollar Traveller's Cheque' printed in bold letters. Immediately below that are the following words, 'When countersigned below with this signature, pay this cheque to the order of ... in ... Singapore dollars ...'. At the bottom left-hand corner is a space for countersigning and below that space the following words are printed, 'countersign here in presence of person cashing'. The purchaser's application form, which was duly completed and signed by Chaiyos on 30 August 1982 acknowledging that he had received the traveller's cheques worth S$32,000 contains the following conditions:

> Each traveller's cheque must be signed immediately on receipt in the space marked 'Signature' at the top of the cheque and only counter-signed in the presence of the paying agent at the time of encashment — Any loss arising for non-observance of this precaution shall be borne by the purchaser.
>
> I acknowledge receipt of the traveller's cheques issued hereon and agree to above conditions.

Immediately below that is the signature of Chaiyos, the purchaser.

The appellant also included in their bundle of documents the following instructions to the purchaser of traveller's cheques:

> For your protection:
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> — Sign each cheque (at the top) immediately upon purchase.
> — Do not countersign them (at the bottom) until the time of encashment and in the presence of the cashier ...

In his evidence at the trial, Mr Yap Lee Hoong, the appellant's clerk said:

> Before we sell the cheques to him (Mr Chaiyos), we checked his passport, write down the particulars in the application form and he would sign on the top left-hand corner of the cheques. I made sure he signed the cheques. He then collected the cheques. He only signed the top portion and the bottom would be left blank ... The bottom portion would only be signed by the customer when he wanted to encash the cheques ...

It is clear from the terms and conditions stated above that the traveller's cheque is an order to pay subject to the condition that it must be countersigned by the person whose signature appears at the top of the cheque. In other words the order is conditional. Professor Ellinger, who has examined traveller's cheques issued in several countries, has come to the following conclusion:

> There are orders, or promises, to pay subject to the occurrence of a future event, that is, the execution of a countersignature by the traveller. It is true that once they are countersigned, these traveller's cheques become absolutely payable, but this does not overcome the difficulty that the order, when given is conditional ...

A See EP Ellinger *Traveller's Cheques and the Law* (1969) 19 UTLJ 132 at p 137. *Chitty on Contracts* (26th Ed) Vol 2 at p 259 states:

> It will be noted that traveller's cheques drafted in the first two patterns mentioned above resemble bills of exchange while those following the third pattern resemble promissory notes. However, the order in the first two patterns as well as the promise in the third one are conditional, ie dependent on the correspondence between the signature and the countersignature ...

B

Since a traveller's cheque is a conditional order, it cannot be regarded as a bill of exchange, promissory note or even a cheque as defined in the Act. Section 3(1) of the Act defines a bill of exchange as an 'unconditional order' in writing. A promissory note is defined in s 88(1) as 'an unconditional promise in writing made by one person to another ...'. Section 73(1) of the Act defines a cheque as a bill of exchange drawn on a banker payable on demand. Therefore, a cheque is also an unconditional order in writing.

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Having considered the nature of traveller's cheques, it is now necessary to examine what law governs traveller's cheques. There is no legislation in Malaysia on traveller's cheques. As far as I am aware, there is no reported decision in this country on the question of traveller's cheques.

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From my research, I found only three English cases on traveller's cheques. These three cases were decided on the terms and conditions of the contract between the purchasers of the traveller's cheques and the issuing bank.

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The first case is *Braithwaite v Thomas Cook Travellers Cheques Ltd.*[2] In that case the plaintiff purchased £50,000 worth of traveller's cheques from the defendant. Within 24 hours he claimed that they had all been lost or stolen in the London Underground and asked the defendant for reimbursement of the purchase price. The defendant refused to pay. The conditions of purchase of the traveller's cheques stated that the issuer would replace or refund the face value of the traveller's cheques lost or stolen provided the purchaser had properly safeguarded each cheque against lost or theft. After the plaintiff had bought the traveller's cheques he put them in a transparent plastic bag. He spent the evening drinking with friends in London and then took the underground home. In the course of the Underground journey he fell asleep and when he got off the Underground he realized that he no longer had the plastic bag. The court held that where an agreement for the purchase of traveller's cheques contained an express condition that the purchaser should properly safeguard the traveller's cheques against loss or theft, the whole of the purchaser's behaviour had to be considered when determining whether he had in fact properly safeguarded them. Since the plaintiff had carried the cheques in a transparent bag instead of concealing them and since he had fallen asleep and had been drinking, the plaintiff could not be said to have properly safeguarded the cheques and therefore he was not entitled to reimbursement of their face value. In *Fellus v National Westminster Bank*,[3] the plaintiff bought £8,000 worth of traveller's cheques. By the terms of the contract for the sale of the cheques it was stated that any loss of cheques should be reported to the police and the nearest branch of the bank and that 'a refund will be made upon completion of our form of application, providing the cheques were signed but not countersigned and there had been no undue negligence'. The plaintiff signed the cheques in

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the presence of a clerk and left the bank. He drove down Oxford Street and parked his car near Selfridges. He went into a shop. He took off his overcoat and put it over his arm. As he got to the basement, he realized that the cheques were not in the pocket of his coat. He reported the matter to the police and to the bank. He then claimed a refund from the bank. The court found that there was no 'undue negligence' and the plaintiff was entitled to a refund. In *El Awadi v Bank of Credit and Commerce International SA*,[4] the plaintiff purchased £50,000 worth of traveller's cheques from the defendant. The agreement covering the purchase contained a clause which stated that 'Any claim for a refund of a lost or stolen cheque shall be subject to approval by the issuer and to presentation to the issuer of the purchaser's copy of this agreement.' A few days later the cheques were stolen from the plaintiff's car, largely due to his own negligence, and £40,700 worth were subsequently encashed. The defendant refused to refund to the plaintiff the full value but agreed to refund to him £9,300 in respect of the cheques which had not been encashed. The plaintiff brought an action against the defendant claiming a refund of £40,700. The court held that on the true construction of the contract entered into between the parties, it contained an express obligation on the part of the defendant to refund lost or stolen cheques regardless of the plaintiff's own negligence or recklessness in safeguarding the cheques. The court ordered the defendant to pay to the plaintiff the sum of £40,700 as claimed.

As stated earlier, the three English cases cited above are cases dealing with the question of the right of purchasers of traveller's cheques to refund in respect of lost or stolen cheques. All the three cases were decided on the construction of the contract entered into between the purchasers and issuing banks at the time the traveller's cheques were purchased. The disputes were therefore between the purchasers of the traveller's cheques and the issuing banks.

In the present case, the dispute is not between the purchaser and the issuing bank but between a third party, the respondent, and the issuing bank. The question that arises here is whether the respondent can sue the appellant on contract.

Miss Belinda Tan, counsel for the respondent, submitted that the respondent's claim was based on the law of negotiable instruments as well as on the law of contract. She said that there was an implied contract between the appellant and the respondent and it was the primary duty of the appellant to honour all traveller's cheques which on the face of them appeared complete and without any defect or imperfection.

Mr Chin, counsel for the appellant, submitted that the respondent's claim as formulated in the statement of claim was not based on contract. He said that if the claim was based on contract there was no evidence of consideration.

Miss Belinda Tan referred to paras 3, 5, 6 and 7 of the statement of claim to show that the respondent's claim was based on the general law of negotiable instruments and the law of contract.

I have read the statement of claim and I find that the claim is not based on contract but based on the general law of negotiable instruments.

Assuming that the claim is based on contract, the question for the court to consider is whether the respondent has a case against the appellant on contract. Mr Chin submitted that in order to succeed on a claim on contract the respondent must prove consideration. Consideration is defined in s 2(d) of the Contracts Act 1950. It states:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

From the terms of the agreement entered into between the appellant and Chaiyos, it is clear that the appellant had signified its willingness to honour the traveller's cheques if the terms and conditions are observed. The appellant is the promisor in this case. Chaiyos is the promisee and the respondent may be considered as 'any other person'. The next question to consider is whether there is consideration in this case.

One writer has expressed the view that under s 2(d) of the Contacts Act 1950, '... consideration may move from a party who is not necessarily the promisee; it may move from "the promisee or any other person ..."'. According to the writer '... consideration under the Contracts Act may move from a third party ...' (see Visu Sinnaduray *Law of Contract in Malaysia and Singapore* (2nd Ed) at p 112). But in *Kepong Prospecting Ltd & Ors v Schmidt*,[5] the Privy Council said:

> The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English law, Schmidt would be unable to enforce it... It is true that s 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. *On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue* ... (Emphasis added.)

From the passage quoted above, it is clear that the respondent's claim on contract against the appellant cannot succeed because it is not a party to the contract.

If the respondent cannot sue the appellant on contract, the next question is whether the respondent can rely on the general principles of the law of negotiable instruments.

In England, the position is that the general principles of the law of negotiable instruments as contained in the Bills of Exchange Act 1882 apply, with the necessary modifications, to traveller's cheques. See *Chitty on Contracts* (26th Ed) p 259.

The question here is whether the respondent was a holder in due course as defined in s 29 of the Act. Section 29(1) states that 'A holder in due course is a holder who has taken a bill complete and regular on the face of

it ...'. Although traveller's cheques are not bills of exchange or promissory notes or cheques, in my opinion s 29(1) applies to traveller's cheques. My opinion is based on a passage in *Chitty on Contracts* (26th Ed) at p 263 where the learned author states:

> To be a holder in due course of a traveller's cheque, the holder must be able to show that he took it in good faith, for valuable consideration and while it was complete and regular on its face.

The footnote shows that the above passage is based on s 29 of the English Bills of Exchange Act 1882.

From the evidence, the respondent took the traveller's cheques in good faith and for valuable consideration. The traveller's cheques were accepted as payment for the watches bought by Frankie.

According to the respondent the traveller's cheques were properly countersigned. The problem that arises here is that according to the evidence, Frankie did not have a good title. According to *Chitty on Contracts*, in such a situation the holder's 'rights depend, first, on the genuineness of the countersignature and secondly on his holding the cheque in due course ...'.

The procedure for accepting the appellant's traveller's cheques is stated in the appellant's bundle of documents used during the trial. The procedure is reproduced below:

1. Let your customer countersign on the lower left-hand corner of the traveller's cheque in your presence. Compare this signature with that appearing on the top left-hand corner. If the two signatures agree you may accept the traveller's cheque. If they differ you should ask him to endorse on the back of the traveller's cheque in your presence and you may accept if this signature agrees with that appearing on the top left-hand corner of the traveller's cheque.
2. If the traveller's cheque has been countersigned before presentation to you, you should ask him to endorse on the back of the traveller's cheque in your presence. If you are satisfied that this signature is the same as that appearing on the top left-hand corner you may accept the traveller's cheque. You should also ask for the customer's passport or other acceptable proof of identity.
3. You should not accept a countersigned traveller's cheque from a person who is not the original owner. If you do have to accept such a traveller's cheque, the customer should be known to you and you should take steps to ensure that he endorses the traveller's cheque on the reverse side in your presence, and that you have a right of recourse.
4. OCBC traveller's cheques are printed on special security paper and for your protection you should examine each traveller's cheque for any evidence of tampering or alteration such as discolouring or disappearance of background design. If you notice any sign of tampering or alteration, you should not accept the traveller's cheque.
5. OCBC traveller's cheques are valid without any time limit.

According to the evidence of the sale manager of the respondent company, the traveller's cheques were countersigned by the said Frankie in his presence. He examined Frankie's passport and was satisfied that the signatures on the traveller's cheques and the signature in the passport were similar. He

examined the photograph in the passport and found that it was the same person as the customer before him. He did not suspect that there were irregularities. He was satisfied that everything tallied and the customer looked reasonable. He did not have any list of stolen or defective traveller's cheques and he was not aware of any defect in the traveller's cheques. He was satisfied that the traveller's cheques were in order and he accepted them as payment for the watches.

It is clear from the evidence that the respondent had complied with the procedure laid down by the appellant. The respondent had even gone one step further by checking Frankie's photograph and signature in his passport.

I have not been able to find any reported case here or in England regarding this point. Miss Belinda Tan, in her written submission cited a number of relevant decisions of the courts in the United States. In my view this court may consider the American decisions because they provide useful guide for the purpose of the present case. In *Director General of Inland Revenue v Kulim Rubber Plantations Ltd*,[6] Chang Min Tat FJ, in delivering the judgment of the Federal Court said at p 216:

> Insofar as the decisions of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we successfully distinguished them or hold them as per incuriam. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of the law, pay due and proper attention to them.

In that case the Federal Court found no local precedent on the issue before it and proceeded to examine decisions of the courts in Australia, New Zealand, England and Scotland. Our courts have also referred to American decisions. See *Hashim bin Saud v Yahaya bin Hashim & Anor*,[7] *Re Haji Mohamed Eusoff decd*,[8] *High Mark (M) Sdn Bhd v Pacto Malaysia Sdn Bhd*.[9] See also the decision of the Privy Council on an appeal from Singapore, in *Howe Yoon Chong v Chief Assessor & Anor*.[10] It will be noted that the English Court in the *El Awadi* case[4] followed an American decision. I shall now proceed to examine the American decisions.

The first case is *American Express Co v Anadarko Bank & Trust Co*.[11] In that case, the plaintiff did a world-wide business in certain instruments particularly traveller's cheques. In order to promote and facilitate the business, the plaintiff maintained and operated offices and agencies in many towns and cities. During the year 1931, the plaintiff sent some of its traveller's cheques to its agent, Gorham State Bank and sometime in October the same year the bank was robbed and the robbers took all the plaintiff's traveller's cheques in the safe. Subsequently, one of the customers of the defendant bank by the name of EA Dunn came into possession of some of the stolen traveller's cheques and the defendant bank cashed the same for its customer. The traveller's cheques bore the signature of one Roy Bison and the countersignature bore the same name. The defendant bank then presented the said traveller's cheques to the plaintiff for payment but the plaintiff denied liability on the ground that at the time the traveller's

cheques were delivered to Gorham State Bank, they were incomplete instruments and there was never any delivery of the instruments within the meaning of the negotiable instruments law. It was conceded that the defendant was an innocent holder of the traveller's cheques for full value and in the course of business.

The Supreme Court of Oklahoma decided that the defendant bank accepted the traveller's cheques as money and they did not have any knowledge or possible knowledge that the traveller's cheques were stolen. The instruments on their face were genuine and under the circumstances, the plaintiff was precluded from denying liability. The Supreme Court confirmed the decision of the district court which gave judgment in favour of the defendant. In the course of its judgment, the Supreme Court said:

> At the time it is delivered to the purchaser he is ordinarily required to write his signature in the space provided for that purpose in the upper left-hand corner. Should he omit to do so, however, there is nothing on the face of the instrument which would prevent his completing it later. On the contrary, the instrument provides that the signature appearing in the space left for that purpose in the upper left-hand corner shall be the sign manual of the rightful holder and that the same signature in the space provided for that purpose in the lower left-hand corner shall constitute the countersign whereby all doubts are dispelled and any payee of said instrument is assured that he can accept the same with the same freedom that he would the tender of actual money or currency. The instrument provides further that the name of the city where and the date on which the cheque is cashed together with the name of the payee are to be inserted by the original holder at the time of cashing. Plaintiff in effect concedes that when the signature constituting the sign manual is affixed in the presence of the issuing agent that all other blanks in the instrument may thereafter be completed away from the issuing office and without in any way affecting the validity of the instrument. If the signature appearing as the sign manual must be placed on the instrument in the presence of the issuing agent before such instrument can be deemed complete, then the issuing agent should be required to attest to such fact, otherwise a party tendered such cheque can have no way of telling whether the signature thereon is that of a purchaser or that of a thief. Otherwise lacking such, a person would be very foolish indeed to accept any traveller's cheque which might be tendered to him. This would be contrary to the intent and purpose of the plaintiff since the plaintiff in every way possible seeks to have its cheques take the place of money and to pass current as money. In order to accomplish this it has deliberately prepared these traveller's cheques in such manner as to assure the person accepting them that if the countersignature in the lower left-hand corner of the instrument is the same as that of the signature in the upper left-hand corner that he may accept the instrument without hesitation and without fear of any latent defect or imperfection. When the person cashing such cheque has met the requirements imposed upon him by the instrument itself, he should not be required to go back thereof at his peril. Likewise if the cheques are to take the place of money and pass current as money they should be subjected to the same rules and immunities which rest upon money under like circumstances. The great weight of authority supports the rule that when one comes into possession of stolen money bona fide and for valuable consideration that his title thereto is superior to that of the true owner.

The decision of the Supreme Court of Oklahoma was followed in *Transcontinental & Western Air Inc v Bank of America National Trust & Savings*

Association.[12] In that case, the District Court of Appeal, Second District, Division 2, California, in its judgment at pp 795 and 796 said:

> Inasmuch as the cheques were complete at the time they came into the hands of innocent holders, the latter will not be allowed to suffer the loss occasioned by the dishonesty of an employee who appropriated the cheques by stealthily issuing them for funds for his own use. *American Express Co v Anadarko Bank & Trust Co,* supra; *Cooke v United States* 91 US 389, 23 L Ed 237. In the latter case it was held that treasury notes printed and ready to issue and which were stolen and placed in circulation passed title to bona fide purchasers for value. The holders of the cheques wrongfully issued by Ole May to himself having come into the possession of bona fide holders, the title gained by such holders was superior to that of the bank. Each cheque on its face was free from suspicion of the illegal act of May; no holder had any notice. It follows that the purchaser of any of such cheques in good faith was not required under any principle embodied in the universal negotiable instruments law to inform himself of the history of the cheque before he could with safety acquire legal ownership thereof. So universal is the use of commercial paper, such as the traveller's cheques in question, that it should have the same freedom of circulation as a government bond. This is possible only by giving to it the sanctity of the promise of a saint by encircling it with the arm of the law. Any other method of treating such paper in the channels of trade and commerce would interfere with the normal flow of business transactions. *Chemical National Bank v Kellogg* 183 NY 92, 75 NE 1103, 2 LRA, NS 299, 11 Am St Rep 717, 5 Ann Cas 158. If a traveller's cheque, after the blanks are filled, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands.

The next case is *Emerson v American Express Co.*[12] In that case the plaintiff purchased some traveller's cheques from the defendant. He signed his name in the space meant for signature in the presence of the clerk who effected the sale. Immediately afterwards, contrary to instructions he countersigned the traveller's cheques. A few hours later he lost the countersigned traveller's cheques. He then gave notice to the defendant and subsequently, he filed an action to recover the amount of traveller's cheques, which he had lost. The plaintiff argued that the defendant who had notice of the loss, should have stopped payment when the traveller's cheques were presented by third parties.

Cayton CJ dismissed the action and held that the defendant was bound to honour the traveller's cheques presented by third parties who were holders in due course. In his judgment at pp 240 and 241, Cayton CJ said:

> In a comparatively recent Federal case the function and status of these checks were well-stated thus: 'The essential value and purpose of a traveller's cheque is that it is a cashier's cheque payable by a bank or other corporation of unquestioned financial standing and integrity which is placed by the issuing bank in the hands of agent banks for delivery to any person who will pay the face value plus a small premium. It is payable to such individuals without identification and merely upon corresponding signatures. They are freely accepted not only by banks but in remote rural communities. That they are cheques which are intended to be and are freely negotiable cannot be gainsaid. Refusal of payment by the issuing bank or trust company because of defences ordinarily available would be practically destructive of the entire business of placing such cheques in circulation. The special attributes and functions of these cheques have long been recognized.

The next case is *Ashford v Thomas Cook & Son (Bankers) Ltd*[14] which was decided by the Supreme Court of Hawaii. In that case the court said:

> We believe we should take a more realistic and less technical approach and recognize that [traveller's cheques] have been accepted by the public as a medium of exchange and that they have acquired negotiable characteristics by established custom and general acceptance by the public rather than by conformity with provisions of the negotiable instruments law or of the Uniform Commercial Code.
>
> It is common knowledge that any establishment issuing [traveller's cheques] intends its [cheques] to be readily and freely passable from one person to another as money. This is not only intended, but it is widely advertised that [traveller's cheques] are readily accepted in commerce as money and that they are safer. The public is made to believe that [traveller's cheques] are a substitute for money, a medium of exchange, which are self-identifying and accepted everywhere, but, unlike currency, they can be carried without danger of loss or theft because of the protective device of signature and countersignature.
>
> We believe that if [traveller's cheques] are intended by the issuer and accepted by the public as a medium of exchange to take the place of money, they should be subjected to the same rules of law applicable to money under like circumstances.
>
> The general rule is that when one in good faith acquires possession of stolen money for valuable consideration his title is superior to that of the true owner.

From the American cases I have just cited, it can safely be concluded that the issuing bank is under a legal obligation to honour all traveller's cheques, including cheques alleged to have been stolen or forged, when the same are presented for payment by a bona fide holder in due course.

In my opinion the principles laid down in the American cases, in particular the *Anadarko* case[11] are relevant to the present case and I respectfully adopt them for the purpose of the present case. Indeed the learned author of *Chitty on Contracts* envisages that an application of the English law of negotiable instruments is likely to lead to a decision similar to that of the Supreme Court of Oklahoma in the *Anadarko* case.[11] At p 264, the learned author of the same book states:

> An application of the English law of negotiable instruments is likely to lead to a decision similar to that of the Supreme Court of Oklahoma. If the thief's 'signature' is treated as that of the drawer, then the issuing bank, by reason of the fact that it has accepted the bill, will be precluded from denying to a holder in due course the existence of the drawer and the genuineness of his signature. Since this 'signature' and the countersignature are affixed by one and the same hand, ie the hand of the thief, so that the signature and countersignature correspond with each other, the bank cannot assail the genuineness of the countersignature. A holder in due course should, thus, be entitled to enforce payment of the instrument. Even if the addition of a signature and a countersignature were treated as a 'material alteration', the holder in due course should be entitled to enforce payment according to the original tenor of the instrument. As the amount of the instrument is not changed in this type of case, the holder in due course would be able to recover the amount of the instrument. The fact that the 'acceptance' of the drawee was written on the bill before it was signed by the drawer, or before the bill was complete, would not defeat the holder's rights.

A After considering all the authorities cited above and all the evidence in the present case, I am of the opinion that the respondent being a bona fide holder in due course is entitled to payment by the appellant irrespective of whether the traveller's cheques were stolen or whether the person who presented the traveller's cheques to the respondent did not have a good title.

B For the reasons stated above, I dismiss the appeal with costs.

Appeal dismissed.

Reported by Wong Kim Fatt

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